IN THE

Supreme Court of the United States

October Term, 1948

No. 501

FREDERICK JOHN WOLFE,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

ROBERT H. MONTGOMERY,
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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Frederick John Wolfe respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review a judgment of that court entered in this case on October 12, 1948; and therefore shows as follows:

I.

A summary and short statement of the matter involved.

This action involves the petitioner's United States income tax liability for the calendar year 1941. The United States Court of Appeals for the Ninth Circuit affirmed (R. p. 112) a decision favorable to the respondent in The Tax Court of the United States (R. p. 40).

(Hereinafter, in this Petition for Writ of Certiorari and Brief in support thereof, Imperial Oil Co., Ltd., a Canadian corporation (R. pp. 16, 19) will be referred to as "Imperial", Standard Oil Company of New Jersey will be referred to as "Standard", Standard Oil Export Company will be referred to as "Export", and Anglo-American Oil Co., Ltd., an English corporation (R. pp. 5, 13, 16) will be referred to as "Anglo".)

Petitioner is an individual (R. pp. 4, 5, 12, 13, 16), citizen of Canada (R. pp. 5, 13, 16). Petitioner has never been in the employ of Standard (R. pp. 68, 86) or Export (R. p. 68). From the time of his birth in 1879 and until 1931 petitioner was a resident of Canada (R. p. 16).

In June, 1902, petitioner entered the employ of Queen City Oil Co., Ltd. (R. pp. 16, 19, 29, 59, 64), a Canadian corporation (R. pp. 16, 59), which was, in 1911 or 1912, absorbed by Imperial (R. pp. 16, 19, 29, 59). Imperial was largely owned by Standard (R. pp. 29, 59, 60). Petitioner continued in the employ of Imperial until March 1, 1931 (R. pp. 16, 59), at which time he was Vice-President and a member of the Board of Directors (R. p. 59).

Two or three months prior to March 1, 1931, petitioner was requested by Mr. G. Harrison Smith, the Senior Vice-President of Imperial, to go to England and take over the duties of Managing Director of Anglo (R. pp. 16, 60, 73). Petitioner and Mr. Smith discussed the salary petitioner was to receive (R. pp. 17, 60-61). Petitioner told Mr. Smith he would go to England (R. p. 60).

Thereafter, and prior to March 1, 1931, petitioner had conversations with officials of both Standard (R. pp. 17, 60) (which controlled the stock of Export (R. p. 60)), and Export (R. pp. 17, 60) (which controlled the stock of Anglo (R. p. 60)). These conversations were had so that petitioner

might obtain knowledge of the background of Anglo (R. pp. 17, 60).

In none of petitioner's conversations, referred to in the two paragraphs immediately preceding, with officers of Imperial, Standard, and Export, was the question of petitioner's retirement pay in the event of his eventual retirement discussed. It was not mentioned in any way, shape or form (R. p. 61). Standard did not guarantee the payment of retirement pay to petitioner (R. pp. 73-74). Petitioner had nothing in writing to evidence the fact that he was being offered the position with Anglo and he never did have a written contract of employment (R. pp. 74-75).

While, as stated in the next preceding paragraph, petitioner did not discuss with anyone the matter of his retirement pay in the event of his eventual retirement, he knew that Anglo had a scheme or plan in existence for paying its retired employees. Petitioner did not know much about the actual details of the plan, but he knew that the basis of the plan was that an employee was entitled on retirement to roughly 2 per cent per year of service, based on a maximum of 75 per cent, and the average of the last 5 years' pay. Retirement at 60 for one who had the full 37½ years of service would be about 66.3 per cent (R. p. 17). Petitioner understood that he would be entitled to the benefits of this plan as an officer of Anglo, but this understanding of his was not based on any discussion of the matter with any officer of Imperial, Standard, or Export (R. p. 61).

On March 1, 1931, petitioner went to England (R. p. 59) and became Managing Director of Anglo (R. pp. 5, 13, 16, 23, 59, 73). In an English company the duties of a managing director are similar to those of an executive vice-president of an American corporation (R. p. 62). On July 1, 1931, petitioner also became Chairman of Anglo (R. pp. 5,

13, 16, 61). In an English company the duties of a chairman are similar to those of the president of an American corporation. Anglo had no president (R. pp. 61-62).

As heretofore stated, petitioner had assumed when he went to England that he would be entitled to the benefits of Anglo's superannuation scheme, which he knew to be in existence and the general basis of which he understood. After he arrived in England, he discovered that he was not eligible to participate in that plan because that plan required that an employee, to participate, must have been in the employ of Anglo in May, 1928. Furthermore, petitioner discovered that the funds of Anglo's superannuation plan were invested in stocks which he did not consider to be proper investments. The fund was not in a very sound financial condition (R. pp. 63, 65).

As a result of these discoveries, after March 1, 1931 and prior to October 22, 1931, petitioner discussed with other executives of Anglo the question of payments to be made to him in the event of his retirement from the services of Anglo (R. pp. 17, 29, 62, 64). Petitioner told these executives very plainly that he wanted to be considered on the same basis as those who were under the superannuation plan (R. pp. 17, 64). Petitioner also had a conference with certain officers of Standard. At this conference it was decided that "this question is to be deferred until the Anglo-American Oil Company has revised its annuity plan". It was recognized at the conference with Standard that if the proposed revision of Anglo's plan did not "fully take care of Mr. Wolfe's case", "the matter will have to be given special consideration at the proper time" (R. pp. 18, 80-81).

In the negotiations between petitioner and other executives of Anglo, referred to in the preceding paragraph, but not in the negotiations with officers of Standard, there was

also discussion of the length of time that Anglo was to consider that petitioner had been in its employ (R. p. 64). As a result of these discussions, it was decided that petitioner was to be treated as if he had been in the employ of Anglo from the date in June, 1902 when he entered the employ of the Queen City Oil Co., Ltd. (R. pp. 19, 64).

On October 22, 1931 the Board of Directors of Anglo adopted a resolution to dispose of both of the questions which had been raised by petitioner—namely, the question of whether petitioner would be considered on the same basis as those who were entitled to the benefits of Anglo's superannuation plan and the question of the length of time Anglo was to consider that petitioner had been in its employ. Said resolution was as follows:

> "Resolved, it being part of the arrangement with Mr. Wolfe on his joining the Board of this Company, and becoming Managing Director, that for the purpose of calculating pension payable by this Company to him, his services shall be deemed to commence from June, 1902, on which date he joined the Queen City Oil Co., Ltd. (which was subsequently absorbed by the Imperial Co., Ltd., of Canada), and that he be entitled to pension on the same basis as employees benefiting under the Company's Superannuation Scheme dated 31st December, 1925, or any subsequent modification thereof" (R. pp. 19, 64, 67).

On October 23, 1931 petitioner was formally advised of the adoption of said resolution by the Secretary of Anglo (R. p. 64).

Petitioner suffered from asthma. He had been advised by his physician on many occasions that England was not a proper climate for him and that when the opportune time came he should get out of England and go to a warmer country, such as California (R. pp. 65-66).

In 1939, petitioner began discussing the possibility of his retirement with the financial director of Anglo, a Mr. Carder. Petitioner told Mr. Carder that he intended, after his retirement, to live in the United States and that he would want his annuity payable to him in dollars. To that Mr. Carder was agreeable. They discussed the possibility of purchasing an annuity for the petitioner from an insurance company (R. p. 66).

Mr. Carder suggested that a solution to the problem might be for Anglo to pay a certain amount of money to Standard, the latter to pay the annuity (R. p. 66). Petitioner then discussed the matters he had discussed with Mr. Carder with an official of Standard (R. p. 67).

In the negotiations with Standard, various proposals were made. These proposals included payment to the petitioner by Standard "with a periodic billing of Anglo" (R. p. 91), the deposit by Anglo of funds with Standard from which payment would be made (R. pp. 20, 21, 82-83) and the purchase of an annuity by Anglo from an insurance company (R. pp. 66, 90-93). None of these proposals were ever carried out. On March 22, 1940 "an agreement of annuity" drawn by an official of Standard was entered into between Anglo (which executed the agreement in London (R. p. 58)), Standard and petitioner. (Standard and petitioner executed the agreement in New York (R. p. 58).) Under said agreement, Anglo paid to Standard the sum of £89,120 ($415,786.75 at the official rate of exchange) in consideration for which Standard agreed "to pay Mr. Wolfe (the petitioner) a life annuity of $3,038.75 per month". £89,120 was the capital sum representing "the liability which it (Anglo) would have incurred had it granted Mr. Wolfe (the petitioner) a sterling pension equivalent to that payable under the superannuation scheme of the Anglo Company" (R. pp. 23-26). The pertinent parts of said agreement of March 22, 1940 are set forth in Appendix A hereto.

Petitioner retired from the employ of Anglo on July 1, 1940. Beginning with a payment on July 31, 1940, petitioner has received $3,038.75 per month (or $36,465 per year) from Standard pursuant to the agreement of March 22, 1940 (R. p. 26). The $36,465 per year thus received from Standard is the equivalent of £7,293 converted at $5 to the pound. £7,293 is the maximum annuity petitioner could have demanded from Anglo on his retirement on July 1, 1940, under the resolution of October 22, 1931 (R. p. 67).

On December 11, 1940, an official of Standard requested another official of Standard to secure signature cards from petitioner "to whom we pay a special annuity" (R. p. 97).

During the time that petitioner served as an executive of Anglo, from March 1, 1931 to July 1, 1940, neither Standard nor Export ever dominated the administration policies of Anglo. Anglo bought oil and gasoline from Standard, but it also bought it from other people. The administration policies of Anglo were left entirely and absolutely in the hands of the board of directors of Anglo (R. p. 65).

From March 1, 1931, to October 4, 1941, petitioner was a resident of England, a non-resident alien with respect to the United States (R. pp. 5, 13, 16). On October 4, 1941, he entered the United States under the authority of an immigration visa intending to become a resident (R. pp. 5, 13, 71). From October 4, 1941, until the date of the trial of this cause before The Tax Court of the United States, petitioner was a resident of the United States.

Petitioner reported in his income tax return for the calendar year 1941, the sum of $3,041.51 as "income from annuities" with the following explanation:

> "The taxpayer receives an annuity from the Standard Oil Company of New Jersey, the payments being

> made at the rate of $3,038.75 per month. The payments received in 1941 during the taxpayer's residence in the United States totalled $8,822.18. The cash consideration paid to the Standard Oil Company of New Jersey totalled $415,786.75. The taxpayer is excluding from his gross income the amount of $5,780.67, representing the excess of the annuity payments received over three per centum of the principal amount for the period during which the taxpayer was a resident of the United States" (R. p. 71).

On December 11, 1944, the respondent mailed to petitioner a statutory notice of deficiency in the amount of $1,101.49 in income taxes for the year 1941 (R. pp. 4, 9-11, 12, 15). Said notice stated:

> "It is determined that the entire amount received by you from the Standard Oil Company of New Jersey during your residence in the United States constitutes gross income under the provisions of section 22 of the Internal Revenue Code. Accordingly, income from that source has been increased from $3,041.51 reported by you to $8,822.18" (R. p. 11).

A timely appeal from this determination followed (R. pp. 4-8). From an adverse decision of The Tax Court of the United States (R. p. 40), the petitioner appealed to the United States Court of Appeals for the Ninth Circuit, which affirmed The Tax Court of the United States in a *per curiam* opinion (R. p. 111).

II.

A statement particularly disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdicition to review the judgment of the United States Court of Appeals for the Ninth Circuit.

(a) The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States.

The Supreme Court of the United States has jurisdiction to review the judgment of the United States Court of Appeals by reason of the provisions of Section 1254 of Title 28 of the United States Code (Public Law 773—80th Congress, Chapter 646, 2d Session).

(b) The date of the judgment sought to be reviewed and the date upon which the petition for a writ of certiorari is presented.

(1) The date of the judgment sought to be reviewed is October 12, 1948 (R. p. 112).

(2) The date upon which the petition for a Writ of Certiorari is presented is January ~~10, 1948~~. 7, 1949.

III.

The question presented.

The question presented is as follows:

Is the sum of $8,822.18 received by the petitioner from Standard pursuant to the contract of March 22, 1940 during the period October 4, 1941 through December 31, 1941 includible in petitioner's gross income for the year 1941 in full, or is only $3,041.05 includible in the petitioner's gross

income for 1941 in accordance with the provisions of section 22 (b)(2) of the Internal Revenue Code (Title 26 of the United States Code)?

IV.

The reasons relied on for the allowance of the writ.

The United States Court of Appeals for the Ninth Circuit affirmed the decision of The Tax Court of the United States in a *per curiam* opinion, assigning no reasons for its decision. We submit, however, that the necessary effect of the decision is to reach a result either in conflict with decisions of other United States Courts of Appeal or to decide an important question of federal law which has not been, but should be, settled by the Supreme Court of the United States.

1. If the Circuit Court of Appeals for the Ninth Circuit adopted as the basis for its decision one of the reasons relied upon by The Tax Court of the United States, to wit, that the execution of the contract of March 22, 1940 did not result in income to the petitioner in 1940 (R. pp. 38-39), the decision is in conflict with the decisions of the Circuit Courts of Appeal for the First Circuit (*Hackett* v. *Commissioner of Internal Revenue*, 159 F. (2d) 121), for the Second Circuit (*Ward* v. *Commissioner of Internal Revenue*, 159 F. (2d) 502), for the Sixth Circuit (*Hubbell* v. *Commissioner of Internal Revenue*, 150 F. (2d) 516) and the Eighth Circuit (*Oberwinder* v. *Commissioner of Internal Revenue*, 147 F. (2d) 255). In each of the cases cited, it was held that the payment by an employer of the consideration for the issuance of an annuity contract for the benefit of an employee resulted in the receipt by the employee of gross income in the amount of the consideration so paid.

2. If the Circuit Court of Appeals for the Ninth Circuit adopted as the basis for its decision the distinction attempted to be made by The Tax Court of the United States between the *Hackett, Ward, Hubbell* and *Oberwinder* cases (*supra*) and the instant case, to wit, that they all involved "ordinary commercial annuity contracts purchased by employers from insurance companies for employees" (R. p. 40), the decision is in conflict with the decisions of the United States Courts of Appeal for the Fifth Circuit (*Ware* v. *Commissioner of Internal Revenue,* 159 F. (2d) 542), for the Sixth Circuit (*Beattie* v. *Commissioner of Internal Revenue,* 159 F. (2d) 788) and for the Seventh Circuit (*Raymond* v. *Commissioner of Internal Revenue,* 114 F. (2d) 140, certiorari denied 311 U. S. 710), and with its own decision in *Gillespie* v. *Commissioner of Internal Revenue* (128 F. (2d) 140). In each of the cases cited, it was held that annuities paid by other than commercial insurance companies were, nevertheless, subject to tax under section 22 (b)(2) of the Internal Revenue Code (Title 26 of the United States Code) in the same manner and to the same extent as commercial annuities paid by insurance companies.

3. Finally, if the United States Court of Appeals for the Ninth Circuit adopted as the basis for its decision the conclusion of The Tax Court of the United States that "if the petitioner had not 'taxable income' in 1940 in the 'annuity' funds, he had nothing to recover tax-free later" (R. p. 39), the Court decided an important question of federal law—namely,

> That property constituting income under the tax laws of the United States received by a non-resident alien, not subject to tax in the United States, has a tax basis of zero,

which has not been, but should be settled by the Supreme Court of the United States.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this honorable Court directed to the United States Court of Appeals for the Ninth Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in this cause to the end that the said cause may be reviewed and determined by this Court according to law; and that your petitioner may have such other and further relief as to this Court may seem proper and in conformity with law.

And your petitioner will ever pray.

ROBERT H. MONTGOMERY,
JAMES O. WYNN,
Attorneys for Petitioner.

Dated: January 7, 1949.

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in 170 F. (2d) 73 (see p. 111 of the Record). The opinion of The Tax Court of the United States is reported in 8 T. C. 689 (see pp. 14-40 of the Record).

Jurisdiction.

The grounds on which the jurisdiction of the Supreme Court of the United States is invoked are set forth beginning at page 9 herein, in the petition for writ of certiorari.

Statement of the Case.

The facts are as set forth, beginning at page 1 herein, in the petition for writ of certiorari.

Specification of Errors.

1. The United States Court of Appeals for the Ninth Circuit erred in finding and holding that the entire sum of $8,822.18 received by the petitioner from Standard during the period October 4, 1941 to December 31, 1941 under the contract of March 22, 1940 constituted gross income to the petitioner for the year 1941.

2. The United States Court of Appeals for the Ninth Circuit erred in failing to find and hold that only $3,041.51 of the sum of $8,822.18 received by the petitioner from Standard during the period October 4, 1941 to December 31, 1941 under the contract of March 22, 1940 constituted

gross income to the petitioner for the year 1941 under the provisions of section 22 (b)(2) of the Internal Revenue Code (Title 26 of the United States Code).

3. The United States Court of Appeals for the Ninth Circuit erred in affirming the decision of The Tax Court of the United States.

4. The United States Court of Appeals for the Ninth Circuit erred in entering judgment for the respondent.

Summary of the Argument.

Section 22 (b)(2) of the Internal Revenue Code (Title 26 of the United States Code) provides that in the case of amounts received as an annuity under an annuity contract, there shall be excluded from gross income the excess of the amount received in the taxable year over an amount equal to 3 per centum of the aggregate premiums or consideration paid for such annuity. The contract of March 22, 1940 between Standard, the petitioner and Anglo constituted an annuity contract. The aggregate premiums or consideration paid for such annuity was the sum of $415,786.75 paid by Anglo to Standard in consideration for Standard's agreement to pay an annuity of $3,038.75 per month to petitioner during his lifetime and to petitioner's wife for an additional year if she should survive him. The facts that the contract of March 22, 1940 was not a commercial annuity contract and that Standard is not an insurance company are immaterial.

The petitioner in 1940 was a non-resident alien and income received by him from sources outside the United States was not subject to tax in the United States. The fact that the petitioner did not, and was not, required to pay tax to the United States upon the income realized by him in

1940 by the execution of the contract of March 22, 1940 does not affect the manner in which the annuity payments to the petitioner under said contract in 1941 after he became a resident, are reportable under section 22 (b)(2) of the Internal Revenue Code (Title 26 of the United States Code).

ARGUMENT.

I.

The payment of $415,786.75 constituted "the aggregate premiums or consideration" paid for petitioner's annuity.

Section 22 (b)(2) of the Internal Revenue Code (Title 26 of the United States Code) as that section applied to the taxable year 1941 so far as pertinent † to this matter reads as follows:

> ". . . Amounts received as an annuity under an annuity . . . contract shall be included in gross income; except that there shall be excluded from gross income the excess of the amount received in the taxable year over an amount equal to 3 per centum of the aggregate premiums or consideration paid for such annuity . . . until the aggregate amount excluded from gross income under this chapter * or prior income tax laws in respect of such annuity equals the aggregate premiums or consideration paid for such annuity. . . ."

It is clear that if, under the foregoing section, the aggregate premiums or consideration paid for petitioner's annuity was the sum of $415,786.75 paid by Anglo to Standard, the petitioner is entitled to exclude from gross

† For the convenience of the Court, section 22 (b), as that section applied to the taxable year 1941, is set forth in full in Appendix B.
* Chapter 1.

income the amount of his annuity in excess of an amount equal to 3 per centum of the amount so paid.

It is conceded that the petitioner himself made no payments toward the cost of the annuity. However, it cannot be questioned that Anglo paid Standard £89,120 or $415,786.75 (R. p. 26) and that Standard "agreed to accept the aforesaid £89,120-0-0 from The Anglo Company and to pay Mr. Wolfe a life annuity" (R. p. 24). The fact that the consideration was paid by Anglo and not by the petitioner does not prevent such payment from constituting "the aggregate premiums or consideration paid" within the meaning of section 22 (b)(2). That specific question was presented in *Hackett* v. *Commissioner of Internal Revenue* (159 F. (2d) 121, aff'g 5 T. C. 1325).

In the *Hackett* case, the taxpayer's employer in 1941 purchased an annuity contract for him. He contended that the consideration paid by his employer for the annuity did not constitute income to him in 1941 upon the ground, among others, that the consideration paid by his employer would not be considered as "consideration paid" for the annuity in determining the amount to be reported under section 22 (b)(2) when the annuity was paid in future years. The taxpayer argued that the phrase "the aggregate premiums or consideration paid for such annuity" in section 22 (b)(2) must be construed to mean "paid by the annuitant for such annuity".

The United States Court of Appeals for the First Circuit concluded that there should be included as a part of "the aggregate premiums or consideration paid" "not only direct payments but situations where in effect, if not in fact, the recipient paid the consideration". Since the employer had paid the consideration to the insurer, thereby conferring a benefit on the employee, and such payment

constituted gross income to the employee, it was determined that the payment by the employer did constitute "the aggregate premiums or consideration paid".

In its opinion in the *Hackett* case (*supra*), The Tax Court of the United States said:

> "In other words, in the *Freeman* case* we construed the words 'aggregate premiums or consideration paid for such annuity' to include payments by others on behalf of the annuitant in the form of compensation as well as by the annuitant himself. . . ."

The same holding is implicit in the decisions in *Oberwinder* v. *Commissioner of Internal Revenue* (147 F. (2d) 255 (C. C. A. 8), aff'g T. C. Memo. April 26, 1944), *Hubbell* v. *Commissioner of Internal Revenue* (150 F. (2d) 516 (C. C. A. 6), aff'g 3 T. C. 626) and *Ward* v. *Commissioner of Internal Revenue* (159 F. (2d) 502 (C. C. A. 2), aff'g T. C. Memo. November 29, 1945). In each of these decisions, it was held that an employee realized gross income upon the payment by his employer of the consideration for an annuity for his benefit. A holding that such payment by the employer did not constitute "the aggregate premiums or consideration paid" within the meaning of section 22 (b)(2) would result in the double taxation of the employee upon the same amount: First, when the employer paid the consideration; and Second, when the annuity payments were received.

We submit that, in the instant case, when the petitioner's employer, Anglo, paid to Standard the sum of $415,786.75 in consideration for Standard's agreement to pay an annuity to the petitioner, it conferred a benefit upon the petitioner, that the petitioner thereby realized gross income and that such payment constituted "the aggregate

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* 4 T. C. 582, on appeal C. C. A. 2.

premiums or consideration paid" within the meaning of section 22 (b)(2). The only difference between the instant case and the decisions cited is that in those cases, the consideration was paid to a commercial insurance company, whereas, in this case, the payment by the employer was to Standard. The respondent has admitted that if Anglo had used the sum of $415,786.75 to purchase an annuity policy from an insurance company instead of paying that sum to Standard, the petitioner's contention would be correct since he stated on page 24 of his brief to the United States Court of Appeals for the Ninth Circuit:

> "If the facts of this case were altered and it appeared that Anglo had used the sum of $415,000 to purchase an annuity policy from an insurance company, or if it had paid that sum to the taxpayer who in turn purchased the annuity, we would agree that the annual payments received by the taxpayer would have been controlled by Section 22 (b)(2) of the Internal Revenue Code, *supra*. In that event the sum of $415,000 would have constituted income to the taxpayer at the time of its receipt. *Hackett* v. *Commissioner*, 159 F. 2d 121 (C. C. A. 1st); *Oberwinder* v. *Commissioner*, 147 F. 2d 255 (C. C. A. 8th); *Hubbell* v. *Commissioner*, 150 F. 2d 516 (C. C. A. 6th); *Ward* v. *Commissioner*, 159 F. 2d 502 (C. C. A. 2d)."

We submit that an attempt to distinguish the cases on the ground that Standard was not an insurance company has no basis in fact or reason. What real difference is there between a payment by Anglo of $415,786.75 in consideration of a commercial insurance company's promise to pay the taxpayer $3,038.75 per month and a payment by Anglo of $415,786.75 in consideration of Standard's promise to pay the taxpayer $3,038.75 per month? Taxation is stated to be "an intensely practical matter". (*Farmer's Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204, 212.) There

certainly is no practical difference between the two situations just mentioned. If the petitioner were here arguing that the contract of March 22, 1940 did not result in income to him in 1940, could he defeat the assertion that he did have income by merely pointing out that Standard is not an insurance company? We feel certain that such a defense would not be accepted.

Anglo conferred a benefit upon the petitioner when it bought Standard's promise as great as if it had bought the promise of a commercial insurance company. Certainly, there is no basis for preferring the promise of the most solvent insurance company over the promise of the Standard Oil Company of New Jersey, one of America's great companies.

An attempt to create a distinction on the ground that Standard was not an insurance company is utterly inconsistent with the decisions in *Raymond* v. *Commissioner of Internal Revenue* ((C. C. A. 7) 114 F. (2d) 140, certiorari denied 311 U. S. 710); *Ware* v. *Commissioner of Internal Revenue* ((C. C. A. 5) 159 F. (2d) 542); *Beattie* v. *Commissioner of Internal Revenue* ((C. C. A. 6) 159 F. (2d) 788) and *Gillespie* v. *Commissioner of Internal Revenue* ((C. C. A. 9) 128 F. (2d) 140) in which section 22 (b)(2) of the Internal Revenue Code was held to be applicable to annuity contracts issued by other than commercial insurers. As was stated by the Court in the *Gillespie* case (*supra*):

> "... That the contract was not labeled 'annuity contract' is immaterial. *Bodine* v. *Commissioner, supra.** ... It is likewise immaterial, if true, that the corporation was not authorized by law to make an annuity contract; for, whether authorized or not, such a contract was made and payments thereunder were received by the taxpayer...."

* 103 F. (2d) 982.

II.

The fact that the petitioner paid no United States income tax for the year 1940 is immaterial.

Throughout the year 1940, the petitioner was a non-resident alien (R. p. 16), and, as such, was required by law to pay income tax to the United States only with respect to income "from sources within the United States" (Section 211 of the Internal Revenue Code; Title 26 of the United States Code). Thus, the petitioner was not required to, and did not, pay a tax to the United States upon the receipt by him of the annuity contract of March 22, 1940.

In its opinion in this case, The Tax Court of the United States held, "if the petitioner had not 'taxable income' in 1940 in the 'annuity' funds, he had nothing to recover tax-free later" (R. p. 39). As authority for this conclusion, the Court cited its own opinion in *Charles L. Jones* v. *Commissioner of Internal Revenue* (2 T. C. 924) involving a taxpayer who was subject to tax in the United States for the year in which the annuity contract was purchased by his employer.

Whether the *Jones* case is a correct decision on the particular facts there involved is not material. The Court was, we submit, in error in holding in the instant case that the consideration paid by Anglo did not constitute "the aggregate premiums or consideration paid" for the petitioner's annuity contract because he had not paid a tax for the year 1940.

It is clear, we believe, that under the cases cited in Point I of this Brief, the payment by Anglo of $415,786.75 resulted in income to the petitioner in 1940, income upon which he would have been required to pay a tax if he had been a resident of the United States during that year, or if

such income had constituted income from sources within the United States. The fact that under section 211 of the Internal Revenue Code the petitioner was not required to pay a tax upon that income cannot obscure the fact that income was, in fact, received.

Certainly, the petitioner would not have been subject to tax in 1940 in the United States if Anglo had in 1940 paid the sum of $415,786.75 to a commercial insurance company. Yet, the respondent conceded in his brief to the United States Court of Appeals for the Ninth Circuit that such a payment would have constituted "the aggregate premiums or consideration paid" for the petitioner's annuity (see p. 18, *supra*).

Section 162 (c) of the Revenue Act of 1942 added to section 22 (b)(2) a new subparagraph (B) reading as follows:

> "EMPLOYEES' ANNUITIES.—If an annuity contract is purchased by an employer for an employee under a plan with respect to which the employer's contribution is deductible under section 23 (p) (1) (B), or if an annuity contract is purchased for an employee by an employer exempt under section 101 (6), the employee shall include in his income the amounts received under such contract for the year received except that if the employee paid any of the consideration for the annuity, the annuity shall be included in his income as provided in subparagraph (A) of this paragraph, the consideration for such annuity being considered the amount contributed by the employee. In all other cases, if the employee's rights under the contract are nonforfeitable except for failure to pay future premiums, the amount contributed by the employer for such annuity contract on or after such rights become nonforfeitable shall be included in the income of the employee in the year in which the amount is contributed, which amount together with any amounts contributed by the employee shall constitute the consideration paid for the annuity contract

> in determining the amount of the annuity required to be included in the income of the employee under subparagraph (A) of this paragraph."

The year here involved is of course 1941, and not 1942 or a later year. However, in supporting the contention there advanced by the respondent, both The Tax Court of the United States and the United States Court of Appeals for the First Circuit in *Hackett* v. *Commissioner of Internal Revenue* (5 T. C. 1325, aff'd 159 F. (2d) 121) held that the second sentence of subparagraph (B) of section 22 (b)(2) of the Internal Revenue Code was merely declaratory of previously existing law. That sentence specifically provides that the amount contributed by the employer shall constitute the consideration paid. There is nothing to indicate that the fact that the employee did, or did not, pay a tax shall have any effect.

The holding of The Tax Court of the United States on this point is equivalent to a holding that any property received by a non-resident alien from sources outside the United States shall have a tax basis of zero, a holding of wide application.

If the decision of The Tax Court of the United States in the instant case is correct, it necessarily follows therefrom that if a non-resident alien receives any property from his employer as compensation, the tax basis of such property is zero because no tax thereon was paid to the United States and that a subsequent sale thereof when such alien is subject to tax in the United States would result in the entire proceeds being subjected to tax. We submit that the theory invoked by The Tax Court of the United States in the instant case is a novel and startling one, finding no support in the provisions of the Internal Reveune Code or in the decided cases.

The provisions of the Internal Revenue Code relating to the determination of gross income and the recognition of gain and loss are of general application and not limited merely to citizens or residents of the United States. The fact that, under section 211 of the Internal Revenue Code, a non-resident alien individual is not required to pay a tax on income derived from sources without the United States does not affect the question as to whether he received income or realized a gain or loss on a particular transaction. We submit that when an alien becomes a resident of the United States, his tax liability must be computed in accordance with the provisions of the Internal Revenue Code and that the cost basis to him of property acquired prior to the time he became a resident must likewise be computed in accordance with the provisions of the Internal Revenue Code without reference to the tax laws of the particular country where he may have resided at the time the property was acquired or whether he was then subject to tax by the United States. There is no warrant in the statute or precedent for any other conclusion.

There is nothing in the Internal Revenue Code to indicate any intention upon the part of Congress to tax to an alien becoming a resident of the United States income in fact received by him while he was a non-resident and not subject to tax by the United States.

III.

The contract of March 22, 1940 was an annuity contract.

A substantial part of the opinion of The Tax Court of the United States (R. pp. 28-38) is directed to a discussion of whether the petitioner received an "annuity" or a "pension" or "benefits from a retirement fund". The entire

discussion of the Court is based upon an error of law and a misconception of the facts.

The fundamental error which The Tax Court has made is in failing to recognize that a pension is, in fact, a form of annuity and that pensions and annuities are for tax purposes treated alike. In the instant case, Standard in consideration of the receipt of $415,786.75 agreed to make definite and periodic payments throughout petitioner's lifetime and for one additional year if his wife survived him. Such an agreement constitutes an annuity contract under any accepted definition of the term. Paragraphs 1 and 2 of Section 46 of the New York Insurance Law read as follows:

> "1. 'Life insurance,' meaning every insurance upon the lives of human beings and every insurance appertaining thereto. The business of life insurance shall be deemed to include the granting of endowment benefits; additional benefits in the event of death by accident or accidental means; additional benefits operating to safeguard the contract from lapse, or to provide a special surrender value, in the event of total and permanent disability of the insured; and optional modes of settlement of proceeds.
>
> "2. 'Annuities,' meaning all agreements to make periodical payments where the making or continuance of all or of some of a series of such payments, or the amount of any such payment, is dependent upon the continuance of human life, except payments made under the authority of paragraph one."

The respondent's regulations (Section 29.22 (b)(2)-2, Reg. 111) define an annuity as follows:

> "Amounts received as an annuity under an annuity or endowment contract include amounts received in periodical installments, whether annually, semi-annually, quarterly, monthly, or otherwise, and

whether for a fixed period, such as a term of years, or for an indefinite period, such as for life, or for life and a guaranteed fixed period, and which installments are payable or may be payable over a period longer than one year. . . ."

In Solicitor's Opinion 160 (C. B. III-2, 60) the then Solicitor of Internal Revenue stated:

"... An annuity is defined in the following manner by Coke: 'An annuity is a yearly payment of a certaine summe of money granted to another in fee for life or yeares, charging the person of the grantor onlye.' (Coke's Littleton 144b (quoted with approval in Kent's Commentaries (14th edition), Part VI, page 460); Bouvier's Law Dictionary (Nalle 3d revision), 201.) However, the term has come to have a somewhat broader meaning, and designates a fixed sum, granted or bequeathed, payable periodically, but not necessarily annually, subject to such specific limitations as to its duration as the grantor or donor may lawfully impose. (3 Corpus Juris, 200.) The essential element is the certainty of the amount to be paid periodically at a certain rate per annum or in a certain aggregate annual amount. (*Peck* v. *Kinney*, 143 Fed., 76, 80.) It was said by the Supreme Court of the State of Ohio in the case of *Chisholm* v. *Shields* (67 Ohio State 374, 66 N. E., 93, 94) that 'an annuity, as understood in common parlance, is an obligation by a person or a company, to pay to the annuitant a certain sum of money at stated times during life, or a specified number of years, in consideration of a gross sum paid for such obligation.' An annuity, then, is a stated sum payable periodically at stated times during life, or a specified number of years, under an obligation to make the payments in consideration of a gross sum paid for such obligation. . . ."

The amounts received by petitioner were amounts received as annuities under an annuity contract within any

of the definitions quoted above. In any event, the label "pension" or "annuity" is unimportant. In the ordinary case of a pension, the recipient may not exclude from gross income any part of the amount received, not because the pension is not a form of annuity, but because no consideration was paid therefor. However, where a consideration *is* paid, as for example where the employee makes some contributions to the pension fund, the pension payments received are taxed in exactly the same manner as any other annuity for which a consideration was paid. This is made clear by the following excerpt from a bulletin* issued by the Bureau of Internal Revenue:

> "The terms 'annuity', 'pension', and 'retirement pay' are often confused with each other. Sometimes these terms are used to describe a plan in which an individual invests some of his own money—either with an insurance company or with his employer—in order to assure himself that he will receive a steady income when he reaches a certain age. At other times, the same terms are used to describe payments which are made by an employer entirely out of his own funds to reward a faithful employee.
>
> "For income tax purposes, all of these plans are, in effect, treated alike so that the recipient of an annuity, pension, or retirement pay is allowed to recover his own investment, if any, tax-free but is required to pay tax on the remainder of the benefits that he receives, as explained in the first part of this article. Therefore, in those cases where the employer pays the entire cost of a pension, the retired employee has no cost to recover and his entire pension is taxable as if it were a payment of additional wages and salary."

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* Your Federal Income Tax (1947 Edition), page 63.

Although the last sentence quoted refers to cases where the entire cost is paid by the employer, the Bulletin also makes plain that the sentence does not apply where before the employee's retirement the employer makes payments which constitute income to the employee at that time. Thus, it is said: *

> "Pensions or retirement pay received from employees' trusts should be treated in the same way as annuities. If the trust is one which meets the statutory tests for exemption from income tax, the amounts, if any, contributed by you as an employee constitute your basic cost of the annuity; if you made no payments to the trust, your cost is zero. If, however, the trust is not exempt from tax, contributions to the trust by the employer are treated as additional compensation to you as the employee, and are taxable to you when credited to the trust, if your rights to a future annuity would not be forfeited by your resignation or discharge occurring before the retirement date. Amounts thus taxed to you as the employee may be treated as part of your basic cost of the annuity."

The issue thus is not whether the payments are to be called a "pension" or an "annuity" but whether the payment by the employer to insure the "pension" or "annuity" for the employee constituted income to the employee at the time of payment. Although for the reasons stated it is believed that the label "pension" or "annuity" is unimportant, we think we should mention briefly some of the misstatements and half-truths running through the opinion of The Tax Court of the United States by which it arrived at the conclusion that there was a pension.

The Court found as a fact that:

> "Various procedures for paying the petitioner were discussed by Standard, Anglo, and petitioner.

* *Ibid.* page 63.

> Among them was a proposal to purchase an annuity for petitioner from a commercial insurance company. This proposal was never accepted or put into effect" (R. p. 19).

Nevertheless, the Court persists in quoting from correspondence during the entire period, with an utter disregard of which of the various procedures was being discussed. Thus, the Court twice quotes (R. pp. 33, 36) from a letter dated January 9, 1940 from Standard to Anglo in which reference was made to the money Anglo had provided "plus the additional amounts which Standard . . . will be required to put up". This then is assumed to establish that Standard is contributing to a retirement fund and would be required to put up additional money. Carefully, any reference is avoided to the letter three days later stating: "When I wrote you the other day, I failed to realize that you have a three-corner agreement. . . . This phase of the case has not been adequately considered" (R. p. 85). The later letter shows that the statements made in the letter of January 9 were made under a misunderstanding of the facts and were not accurate. Does the agreement of March 22, 1940 (R. pp. 23-26) require Standard "to put up" any additional amounts? The answer is "No". Standard, under that contract, received approximately $415,000 and became obligated to pay approximately $36,000 per annum. Standard assumed the risk, inherent in writing any annuity, that if the petitioner lived long enough, the payments to him would exceed the amount received. As compensation, it received the chance of a substantial profit if the petitioner did not survive. The petitioner would have to live more than 11 years before the $36,000 payments equalled the $415,000 received, and if any reasonable rate of income on the $415,000 is assumed, the period would be considerably lengthened. The petitioner has not yet lived even the 11-

year period, and there is no more basis for assuming that Standard will ever have to "put up" anything than there would be in assuming that an insurance company having issued the same contract would have to "put up" anything.

Similarly, reference is made by the Court (R. p. 37) to a statement in a letter dated June 29, 1939 that "it is further proposed that Anglo transfer to S. O. of N. J. for deposit to the sub-account for assigned expatriates in the Annuity Fund the estimated present value of Anglo's liability". The Court then concludes, "This has the sound of mere contribution by Anglo to a general fund, rather than purchase of annuity." All of which is true, except that it has nothing to do with the contract of March 22, 1940. On June 29, 1939, Mr. F. W. Pierce "proposed" a deposit to a sub-account at a time long before the annuity arrangement was agreed upon and clearly was one of the various plans considered but not consummated. Mr. F. W. Pierce, who wrote the letter of June 29, *1939*, was, incidentally, the same gentleman who on January 12, *1940* wrote that on January 9, *1940* he "failed to realize" what the arrangement then was (R. p. 85). At the time the letter of June 29, 1939 was written, the purchase of an annuity from an insurance company was another of the plans still being considered as is shown by the references in the letter to "insuring" the pension and "premium refund" (R. p. 83). Nevertheless, that letter is considered by the Court as evidence of what was the plan finally adopted.

The foregoing are merely illustrative of the errors made by The Tax Court in arriving at its conclusion that the amounts received by the petitioner were received as a pension. However, the Court's entire discussion on this point does not affect the basic legal question presented by this case: Whether the execution of the contract of March 22,

1940 resulted in the receipt of income by the petitioner in 1940. If that question is answered in the affirmative, as we believe it must, the label to be attached to the payments thereafter received by the petitioner is of no consequence.

Conclusion.

It is, therefore, respectfully submitted that the Petition for Writ of Certiorari should be granted as prayed for.

Respectfully submitted,

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JAMES O. WYNN,
Attorneys for Petitioner.

Appendix A (Agreement of March 22, 1940)

Whereas, Mr. Wolfe is Chairman and Managing Director of the Anglo Company and on March 1, 1931, undertook this assignment at the request of the Standard Company on the understanding that if he were eventually retired from the service of the Anglo Company he would receive a life annuity based on the provisions of the superannuation scheme of the Anglo Company as in effect on the date of retirement and that payment of such sterling pension would be guaranteed by the Standard Company in dollars at an exchange rate of five dollars to the pound.

And Whereas, Mr. Wolfe is to be retired from the service of the Anglo Company on the first day of July, 1940.

And Whereas, the Anglo Company is unable to grant formally an annuity to Mr. Wolfe under its own superannuation scheme or pay same from its superannuation fund for the reason that such scheme and related fund are not applicable to any person who entered the employ of the Anglo Company subsequent to May 18, 1928.

And Whereas, the Anglo Company desires to recognize Mr. Wolfe's valuable services to the Anglo Company by contributing to the Standard Company a capital sum of £89,120-0-0 representing the liability which it would have incurred had it granted Mr. Wolfe a sterling pension equivalent to that payable under the superannuation scheme of the Anglo Company.

And Whereas, the Standard Company has agreed to accept the aforesaid £89,120-0-0 from the Anglo Company and to pay Mr. Wolfe a life annuity as hereinafter provided.

Now It Is Hereby Witnessed as follows:

1. That in consideration of the aforesaid understanding with Mr. Wolfe the Standard Company hereby covenants to pay Mr. Wolfe a life annuity of $3,038.75 per month, effective July 1, 1940, with the understanding that should Mr. Wolfe's present wife, Marguerite W. Wolfe, survive him, monthly payments in the amount of $3,038.75 each will be continued and paid to her for a period not to exceed twelve months and in no case beyond the date of her death.

2. Mr. Wolfe hereby accepts this annuity settlement as a complete discharge of any and all pension obligations of the Standard Company, the Anglo Company and any other associated companies.

3. In consideration of Mr. Wolfe's valuable services to the Anglo Company, the Anglo Company has paid to the Standard Company, as a contribution toward the cost of the annuity settlement, the sum of £89.120-0-0, the receipt of which sum the Standard Company doth hereby acknowledge.

4. In consideration of the aforesaid payment the Standard Company hereby indemnifies and for all time agrees to keep indemnified the Anglo Company from and against any liability which the Anglo Company might otherwise have had to Mr. Wolfe in respect to a pension.

5. If Mr. Wolfe shall die prior to July 1, 1940, then the Standard Company will forthwith on the death of Mr. Wolfe being proved to their reasonable satisfaction repay to the Anglo Company the £89,120-0-0 paid to the Standard Company by the Anglo Company under clause 3. hereof with interest thereon at the rate of 3% per annum from the date of payment until the date of repayment.

6. If Mr. Wolfe shall die on or after July 1, 1940, then the Standard Company shall be under no obligation to repay to the Anglo Company any portion of the sum of £89,120-0-0 paid to the Standard Company by the Anglo Company under clause 3. hereof (R. pp. 23-26).

Appendix B

Section 22 (b) of the Internal Revenue Code (Title 26 of The United States Code):

> *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:*
>
> (2) *Annuities, Etc.*—Amounts received (other than amounts paid by reason of the death of the insured and interest payments on such amounts and other than amounts received as annuities) under a life insurance or endowment contract, but if such amounts (when added to amounts received before the taxable year under such contract) exceed the aggregate premiums or consideration paid (whether or not paid during the taxable year) then the excess shall be included in gross income. Amounts received as an annuity under an annuity or endowment contract shall be included in gross income; except that there shall be excluded from gross income the excess of the amount received in the taxable year over an amount equal to 3 per centum of the aggregate premiums or consideration paid for such annuity (whether or not paid during such year), until the aggregate amount excluded from gross income under this chapter or prior income tax laws in respect of such annuity equals the aggregate premiums or consideration paid for such annuity. In the case of a transfer for a valuable consideration, by assignment or otherwise, of a life insurance, endowment, or an-

* Chapter 1.

nuity contract, or any interest therein, only the actual value of such consideration and the amount of the premiums and other sums subsequently paid by the transferee shall be exempt from taxation under paragraph (1) or this paragraph. The preceding sentence shall not apply in the case of such a transfer if such contract or interest therein has a basis for determining gain or loss in the hands of a transferee determined in whole or in part by reference to such basis of such contract or interest therein in the hands of the transferor.